

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**KENT H. MUNRO**

Claimant

VS.

**INDUSTRIAL CHROME**

Respondent

AND

**ACCIDENT FUND INSURANCE CO.**

Insurance Carrier

Docket No. 1,018,344

**ORDER**

Respondent requests review of the November 3, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

**ISSUES**

Following a preliminary hearing, the ALJ entered an order granting claimant's request for medical treatment but denying any temporary total benefits because he found there was evidence claimant voluntarily left his job after accommodated work was being provided. Although the underlying compensability of the claim was not disputed, respondent asserted the statutory defense embodied in K.S.A. 44-501(d)(2). Respondent maintains the post-accident drug test presumptively establishes claimant was impaired and therefore not entitled to benefits under the Kansas Workers Compensation Act (Act), K.S.A. 44-501 et seq.

The ALJ specifically held that the post-accident drug test result was not admissible because the sample in question was not collected at a time contemporaneous with the events establishing probable cause. The ALJ concluded that the accident "[b]y itself was not a source of probable cause to conclude the claimant was impaired by marijuana, and

that [o]nly by considering claimant's prior admission [of weekend marijuana use] did the nurse come to suspect drugs were responsible for claimant's accident."<sup>1</sup>

The respondent and its insurance carrier (respondent) request review of the ALJ's preliminary hearing Order. Respondent argues that the ALJ erred in excluding the post-accident drug test as it contends there was sufficient "probable cause", based upon all the surrounding circumstances, to conclude claimant was impaired at the time of his accident.<sup>2</sup> Respondent contends that it was the unexplainable nature of claimant's accident, his admitted pre-employment weekend use of marijuana, as well as his presentation during the plant nurse's treatment of his wound that gave rise of "probable cause" to suggest claimant was impaired. Accordingly, the respondent believes the Board "must overturn the decision of Administrative Law Judge Avery and deny the claimant medical benefits herein."<sup>3</sup>

Claimant requests that the Board affirm the ALJ's decision to exclude the post-accident drug test results. Claimant believes his own admission of marijuana use, made three months prior to the accident at issue in this claim and unconfirmed by lab analysis, is wholly irrelevant for purposes of determining "probable cause" at the time of his accident on July 23, 2004, as that term is used in K.S.A. 44-501(d)(2). Moreover, claimant argues that under these facts it is clear the only criteria respondent could and did use on the date of the accident to satisfy the "probable cause" element was the unexplained nature of the claimant's accident. Claimant believes the ALJ correctly held that the nature of his accident cannot form the basis of "probable cause".

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The record in this matter is rather voluminous, but can succinctly be summarized. Claimant was hired by respondent in March of 2004. At the time of his hire, he was subject to a routine drug screen to be completed within the first 90 days of employment. During this process, claimant admitted to weekend marijuana use while speaking with the plant nurse, Jackie McGranahan. The drug screen returned a *negative* test result for all substances, including marijuana.

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<sup>1</sup> ALJ Order (Nov. 3, 2004) at 2.

<sup>2</sup> The foundational requirements of the post-accident drug test are not at issue as the parties specifically agreed that in the event "probable cause" was sufficiently established, the test result would be admissible.

<sup>3</sup> Respondent's Brief at 9 (filed Nov. 29, 2004).

On July 23, 2004, claimant began his normal shift. His job as a plater required him to move heavy metal rods into a series of plating tanks by way of an overhead electrical hoist. The rods are approximately 30 inches in length and 3 inches in diameter, and weigh approximately 30 pounds each. The rods are screwed into metal hooks which are “c” shaped but also have a pin on the back. The support pins are used to hang the rods on a metal bar and in turn, the metal bar is elevated over the tanks and then lowered for plating.

As claimant was lowering a set of rods into the first tank, the rods swivelled but claimant adjusted them with his right hand. As he did so, one of the rods came off the support bar and fell against his right arm. The support pin penetrated the muscle of claimant’s right forearm, leaving him with a three inch gash.

Claimant was immediately taken to the plant nurse, and at 3:10 p.m. she began treating his wound. At this time she noticed nothing unusual about his demeanor or attitude. She did not observe dilated pupils nor slurred speech. Claimant did not wobble nor did he fall down. Ms. McGranahan referred claimant on to a local hospital for further treatment. She then “attempted to investigate and understand the circumstances of the accident and injuries to Mr. Munro.”<sup>4</sup>

Ms. McGranahan spoke with co-workers who did not see the accident, and after receiving no logical answers to help her understand how the accident occurred, she concluded she had reason “and probable cause”<sup>5</sup> to be suspicious that the claimant’s accident and injury was contributed to by the claimant’s use of non-prescribed drugs in the workplace.<sup>6</sup> This conclusion and her ultimate decision to direct the hospital to test claimant for non-prescribed drugs was made sometime before 3:27 p.m., 17 minutes after claimant first entered Ms. McGranahan’s office for treatment. At 3:27 p.m., Ms. McGranahan contacted the hospital and ordered them to perform a drug screen. Her contemporaneous notes indicate she believed that “due to the nature, cause, and time of his injury, and the fact that chemical use was questionable at the time of hire” she had reason to believe that claimant was chemically impaired and should be tested.<sup>7</sup>

There were subsequent unsuccessful attempts to investigate the cause behind claimant’s accident, but those were done days later. In any event, it is clear that respondent has no explanation for how claimant’s accident occurred. Ms. McGranahan can only explain that it was claimant’s prior admission of marijuana use coupled with the

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<sup>4</sup> Respondent’s Brief at 4 (filed Nov. 29, 2004).

<sup>5</sup> *Id.*

<sup>6</sup> McGranahan Depo. at 15-16.

<sup>7</sup> *Id.*, Ex. 1 at 1.

unexplained and unwitnessed accident that fueled her suspicion that claimant was impaired.

The ALJ found that “it was claimant’s previous admission, three months before the accident, that led the nurse to request the drug screen.”<sup>8</sup> He went on to find that “[b]y itself, the accident was not a source of probable cause to conclude the claimant was impaired by marijuana. Only by considering claimant’s prior admission did the nurse come to suspect drugs were responsible for claimant’s accident.”<sup>9</sup> Thus, the ALJ concluded that there was insufficient evidence upon which respondent could have formed the requisite “probable cause” upon which to base a request for drug screen. Accordingly, the test result was excluded and benefits were awarded. The Board affirms this finding.

The Kansas Supreme Court has recently addressed the admissibility of drug tests in workers compensation proceedings. The statute, K.S.A. 44-501(d)(2), requires probable cause to believe that an injured worker was impaired, and this belief must arise, exist, or occur contemporaneous with, which is interpreted as meaning during the same time period as, collection of the test sample in order for the test result to be admitted into evidence.<sup>10</sup> Whether a test sample was collected contemporaneous with events establishing probable cause to believe that a workers compensation claimant was impaired is a question of fact.<sup>11</sup>

Although there is a great deal of evidence contained within the record, as it is presently developed, suggesting that an accident such as the one that occurred involving claimant had not happened before, and that this event itself was unwitnessed and uncorroborated, the Board agrees with the ALJ’s analysis that the fact of an accident alone does not satisfy the requisite “probable cause”. Simply because another employee has not fallen victim to the same accident scenario does not, standing alone, reasonably suggest that claimant was impaired. The ALJ concluded, and the Board agrees, that it was the nurse’s prior knowledge of claimant’s admission three months earlier that he used marijuana that most certainly peaked her curiosity. Her reliance on that fact, *particularly when he was tested and the test result was negative*, was unjustified, unreasonable, and certainly not contemporaneous.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated November 3, 2004, is affirmed.

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<sup>8</sup> ALJ Order (Nov. 3, 2004) at 1.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Foos v. Terminix*, 277 Kan. 687, 549, 89 P.3d 546 (2004).

<sup>11</sup> *Id.* at 549.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2004.

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant  
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director